

Turner (Migration) [2022] AATA 1147 (13 April 2022)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Stephen Turner
CASE NUMBER:	2110776
HOME AFFAIRS REFERENCE(S):	BCC2021/1163053
MEMBER:	Michael Cooke
DATE:	13 April 2022
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 482 - Temporary Skill Shortage visa.

Statement made on 13 April 2022 at 4:48pm

CATCHWORDS

MIGRATION – cancellation – Temporary Skill Shortage (Class GK) visa – Subclass 482 (Temporary Skill Shortage) – relationship ceased – member of the family unit – contribution to the community – employment in health sector during pandemic – decision under review set aside

LEGISLATION

Migration Act 1958, ss 5, 48, 116, 140, 189
Migration Regulations 1994, r 1.12

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision dated 18 August 2021 made by a delegate of the Minister for Home Affairs to cancel the applicant's Subclass 482 - Temporary Skill Shortage visa under s.116 of the *Migration Act 1958* (the Act).
2. The delegate cancelled the visa under s.116() on the basis that the basis for the grant of his visa (a relationship between the applicant and his former partner) ended. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.
3. The applicant requested that a decision be made 'on the papers' without recourse to a hearing.
4. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be **set aside**.

CONSIDERATION OF CLAIMS AND EVIDENCE

5. Under s.116 of the Act, the Minister may cancel a visa if he or she is satisfied that certain grounds specified in that provision are made out. Relevantly, to this case, these include the ground set out in s.116(1)(a). If satisfied that the ground for cancellation is made out, the decision maker must proceed to consider whether the visa should be cancelled, having regard to all the relevant circumstances, which may include matters of government policy.

Does the ground for cancellation exist?

s.116(1)(a) - Fact or Circumstance for visa grant no longer exists

6. A visa may be cancelled under s.116(1)(a) if the Minister is satisfied that the decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that is no longer the case or no longer exists.
7. Information before the Department and Tribunal indicates the applicant is no longer in a relationship with his former partner - who was the primary visa holder.
8. The Department received a Request to Cancel a Temporary Visa from the primary visa holder on 28 May 2021 stating that the applicant's relationship with her had ended. On 16 August 2021 she confirmed that the parties had not reconciled.
9. The Tribunal notes that the applicant's visa was granted because the applicant met, among other criteria, the secondary criteria for the visa on the basis that he is 'a member of the family unit' of his former partner, as prescribed by paragraph (2)(a) of regulation 1.12 of the Migration Regulations 1994 (the Regulations), which states:(2)
 10. A person is a member of the family unit of another person (the family head) if the person is 'a spouse or de facto partner of the family head'. To be 'a member of the family unit' of his former partner as prescribed by reg 1.12(2)(a), the applicant needs to continue to be either a spouse or de-facto partner of that person as defined respectively by sections 5F and 5CB of the Act.

11. The applicant was granted the secondary visa on the basis he was as a 'member of the family unit' of the primary visa holder as the applicant was then in 'a genuine and continuing relationship' with his former partner. As he has ceased to be either a spouse or a de-facto partner of that person, he has ceased to be a 'member of their family unit' as prescribed by reg 1.12(2)(a). Based on this information, there appeared to be grounds for cancelling the visa under s116(1)(a) of the Act because a circumstance which permitted the grant of the visa no longer exists.

Consideration of discretion / conclusions

12. For these reasons, the Tribunal is satisfied that the ground for cancellation in s.116(1)(a) exists. As that ground does not require mandatory cancellation under s.116(3), the Tribunal must proceed to consider whether the visa should be cancelled.

Consideration of discretion

13. There are no matters specified in the Act or Regulations that must be considered in the exercise of this discretion. The Tribunal has had regard to the circumstances of this case, including matters raised by the applicant, and matters in the Department's Procedures Advice Manual (PAM3) 'General visa cancellation powers'.

14. Consideration of any relevant factors, including matters raised by the applicant and the Departmental guidelines which cover matters such as:

- the purpose of the visa holder's travel and stay in Australia, whether the visa holder has a compelling need to travel to or remain in Australia

15. The applicant was granted a dependant Temporary Skill Shortage (Subclass 482) visa for the purpose of accompanying Aideen Rois Mahon while in Australia. Information before the Department indicates that the relationship between the visa holder and Aideen Rois Mahon has ceased, as such I find the applicant's purpose of stay in Australia is no longer in line with the original grant of his visa.

16. Departmental records also indicate that the applicant lodged an application for a Working Holiday (Extension) (subclass 417) visa on 28 May 2021 and later withdrew this application.

17. Based on this information, the Tribunal gives this consideration neutral weight in favour of cancellation.

- the extent of compliance with visa conditions

18. The relationship between the primary and the secondary visa holders simply ended and there is no information before the Tribunal to indicate that the applicant has not complied with his visa conditions now or on previous occasions.

19. The Tribunal gives this consideration some weight against cancellation.

- degree of hardship that may be caused (financial, psychological, emotional or other hardship)

20. The applicant has subsequently responded to the Tribunal as follows:

21. Dear AAT,

22. Please consider this as my application for review of the intention to consider cancellation of the Temporary Skill Shortage 482 visa. Whilst in Australia I feel that I

have contributed to the community in a number of ways. My employment within Australia, has been working within the Health Care sector, with the Health Professional Councils Authority (HPCA) and Health Care Australia (HCA). Whilst working with HPCA, I would contribute to the NSW public through dealing with complaints regarding health care professionals throughout the outbreak of COVID 19. This service is important as it ensures that front line staff members have the correct standard to deal with hospitalized patients and to also ensure that members of the public are properly vaccinated. Additionally, whilst working with Healthcare Australia, my compliance role would ensure that all members of staff who are employed with HealthCare Australia are fully compliant with regulatory standards and also have the correct education to ensure that people are vaccinated as quickly as possible. I have also contributed to the community through my payment of tax and shall continue to do so throughout my time in Australia. My previous education in the UK was an undergraduate law degree and therefore feel that I would be an asset to NSW for any area of employment that I continue to work in. Due to the COVID 19 outbreak, I feel that it would be necessary to allow me to stay as there is a shortage in various workforces and it would be appropriate to continue to allow tax paying, educated expats, the opportunity to continue to contribute to the community and economy as a whole. Attached to this letter, I have supplied various pay slips to provide you with evidence of my support of the health care system during COVID 19. ***I have also attached a letter from my employer advising that we are essential workers during the COVID 19 outbreak*** (Tribunal emphasis) and would, again, please request that you reconsider your consideration to cancel the temporary skill shortage visa

23. The Tribunal considers that apart from financial, psychological, emotional or other hardship consequences (as a result of cancellation) the applicant is performing a very necessary role in protecting Australians from the ongoing effects of the COVID-19 pandemic and its eventual resolution.
24. As such, the Tribunal give this consideration maximum weight against cancellation.
 - circumstances in which ground of cancellation arose. If cancellation is being considered because of relationship breakdown, whether the relationship has broken down as a result of family violence. The guidelines indicate that as a general rule, a visa should not be cancelled where the circumstances in which the ground for cancellation arose were beyond the visa holder's control
25. The ground for cancellation arose because the relationship between the applicant and his former partner ended. The applicant did not provide the delegate or Tribunal any comment regarding the breakdown of the relationship or indicate any extenuating circumstances which may have led to the grounds for cancellation. The Tribunal observes that the relationship simply broke down and the ground did not arise out of the non-compliance on behalf of the visa holder.
26. Given the circumstances the Tribunal gives this consideration some weight against cancelling the visa.
 - past and present behaviour of the applicant towards the Department
27. There is no information before the Tribunal to suggest that the applicant has been uncooperative with the Department or Departmental staff.
28. Given no adverse information regarding this, the Tribunal gives this consideration some weight against cancellation.

- whether there would be consequential cancellations under s.140

29. Not applicable

- whether there are mandatory legal consequences, such as whether cancellation would result in the visa holder being unlawful and liable to detention and removal, or whether detention is a possible consequence of cancellation and if so, for how long, or whether there are provisions in the Act which prevent the person from making a valid visa application without the Minister's intervention

30. The applicant was granted a Bridging visa E following the cancellation of his previous Subclass 482 visa. If the Tribunal decides to cancel his visa, the Bridging E visa will cease automatically, and the applicant will become an unlawful non-citizen. He may be liable for detention under section 189 of the Act - if he does not resolve his visa status.

31. If this visa was cancelled, the applicant would be affected by section 48 of the Act, which would cause him to have limited options if applying for further visas while in Australia. However, this visa cancellation does not affect Public Interest Criterion 4013 and the applicant may be granted a future visa should he meet all relevant criteria.

32. Based on these legal consequences, the Tribunal gives this consideration significant weight against cancellation.

- whether any international obligations, including non-refoulement, family unity and best interests of the children as a primary consideration, would be breached as a result of the cancellation

33. Not applicable.

- if it's a permanent visa, whether the applicant has strong family, business or other ties in Australia.

34. Not applicable.

- any other relevant matters

35. None

36. Considering the circumstances as a whole, the Tribunal concludes that the visa should **not** be cancelled

DECISION

37. The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 482 - Temporary Skill Shortage visa.

Michael Cooke
Senior Member